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IN THE
SUPREME COURT OF THE UNITED STATES

HAIDAR MUHSIN SALEH,
ILHAM NASSIR IBRAHIM, *et al.*,

PETITIONERS,

v.

CACI INTERNATIONAL
AND TITAN CORPORATION,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE* RETIRED MILITARY OFFICERS IN SUPPORT OF PETITIONERS

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STATEMENT OF *AMICI*[1]

Amici are retired military officers who have held senior command positions in the U.S. Armed Forces. Consistent with their fidelity to the laws of armed conflict, they maintain a strong interest in continuing this Nation's long tradition of according humane treatment to detainees captured during wartime. With a wealth of experience regarding the practical realities of combat operations abroad, *amici* provide a unique perspective on the relationship between, and respective responsibilities of, U.S. military personnel and private military contractors hired to assist them.

Amici write because they are deeply concerned about the rule emerging from this case: that persons engaging in shocking behavior that the U.S. military does not itself tolerate for its own members have broad impunity from accountability. Specifically, *amici* disagree with the court of appeals' conclusion that private military contractors are the functional equivalent of uniformed U.S. soldiers because that conclusion is inconsistent with the law of war and expert military judgment. Although *amici* recognize that civilian contractors often perform vital functions in support of U.S. military operations, they

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[1] The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least ten days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief.

maintain that the law should not blur the well-settled distinction between civilian contractors and "combatants" because doing so would undermine the United States' commitment to humane treatment of prisoners in our custody and ultimately weaken the reputation and strength of this country's armed forces.

Brigadier General David M. Brahms served in the Marine Corps from 1963 through 1988, with a tour of duty in Vietnam. During the 1970s, he served as the principal legal advisor for POW matters at Headquarters Marine Corps, and in that capacity, he was directly involved in issues relating to the return of American POWs from Vietnam. General Brahms was the senior legal advisor for the Marine Corps from 1985 through 1988, when he retired. He is currently in private practice in California and was formerly a member of the Board of Directors of the Judge Advocates Association.

James P. Cullen is a retired Brigadier General in the U.S. Army Reserve Judge Advocate General's Corps and last served as the Chief Judge (IMA) of the U.S. Army Court of Criminal Appeals. He currently practices law in New York City.

Rear Admiral Donald J. Guter was a line officer in the U.S. Navy from 1970 through 1974. After law school, he served in the Navy from 1977 until he retired in 2002. From June 2000 through June 2002, Admiral Guter was the Navy's Judge Advocate General. Admiral Guter is now President and Dean of South Texas College of Law in Houston, Texas.

Rear Admiral John D. Hutson was commissioned in the U.S. Navy in 1969. After law

school, he served in the Navy from 1972 until he retired in 2000. From 1994 until 1996, Admiral Hutson served as the Commanding Officer, Naval Legal Service Office, Europe and Southwest Asia. Admiral Hutson served as the Navy's Judge Advocate General from 1997 until 2000. Admiral Hutson is now Dean and President of Franklin Pierce Law Center in Concord, New Hampshire.

SUMMARY OF ARGUMENT

This case arises out of one of most shameful episodes in our Nation's otherwise honorable military history—an episode that damaged our country's hard-earned reputation for lawful and humane treatment of wartime detainees. The torture and abuse of prisoners at Abu Ghraib was rightly condemned by President Bush, former Secretary of Defense Rumsfeld, and a number of independent military and civilian investigators. Numerous military personnel were sanctioned, and even imprisoned, for the abuse and torture of detainees. Yet, despite evidence of similar, unlawful conduct undertaken by private military contractors, including by employees of the Respondents, no civilians have yet been held accountable for their role in the Abu Ghraib scandal.

In granting Respondents immunity from suit, the court of appeals erroneously treated these civilian contractors as if they were combatants entitled to invoke a provision of the Federal Tort Claims Act ("FTCA") that bars damages suits for the "combatant activities" of the "military or naval forces or the Coast Guard." 28 U.S.C. § 2680(j). The court reasoned that these contractors were functionally equivalent to U.S. soldiers because they were "integrated" into a "common mission" with the U.S. military, under "ultimate military command," and "subject to military direction." *Saleh v. Titan*, 580 F.3d 1, 6-7 (D.C. Cir. 2009). As *amici* know well, however, merely performing military functions and

taking commands from military officers does not transform a civilian into a soldier.

Rather, under the governing provisions of the Geneva Conventions, "combatants" have a distinct and meaningful legal status. Civilian contractors cannot be considered "combatants," nor can they lawfully engage in "combatant activities," because they are not fully incorporated into the armed forces of a state party to the Conventions (such as the United States) or subject to a military chain of command. Interpreting "combatant" in a manner that is divorced from this well-settled law of armed conflict threatens to erode a distinction foundational to the entire architecture of humanitarian law: that warfare be conducted only by genuine combatants trained in the law of war and subject to discipline through a responsible chain of command.

In addition, the Department of Defense has promulgated numerous regulations setting forth a clear legal and policy demarcation between civilian contractors on the one hand and U.S. soldiers on the other. By conflating contract employees with U.S. soldiers, the court of appeals erroneously substituted its judgment for the expertise of the military.

Finally, membership in the armed forces carries with it unique responsibilities. Soldiers are subject to rigorous training and discipline, and are at all times accountable to the military chain of command. At the same time, military commanders, as representatives of a government entity, are ultimately accountable to the American people for the behavior of soldiers under their command. In view of this comprehensive and distinctive system of justice and political accountability, it makes sense

for Congress to have exempted the "combatant activities" of U.S. military personnel from tort law liability. But given that employees of civilian contractors indisputably are not subject to the military chain of command, and therefore cannot be disciplined or held accountable by the military, it makes little sense to extend to them such absolute tort law immunity for their misconduct.

If Congress wishes to extend wartime immunities to persons who are not genuine combatants, it is of course free to do so by amending the relevant provision of the FTCA. Absent action by the political branches to alter our country's systems of liability, however, the lower court's judicially-created immunity for unlawful conduct by private contracting companies is inappropriate.

ARGUMENT

I. THE COURT OF APPEALS' TREATMENT OF CIVILIAN CONTRACTORS AS THE FUNCTIONAL EQUIVALENT OF U.S. SOLDIERS IS INCONSISTENT WITH BOTH THE LAW OF WAR AND U.S. MILITARY POLICY.

A. The Court of Appeals Should Have Interpreted the "Combatant Activities" Provision of the FTCA in a Manner Consistent with the Law of War.

The court of appeals concluded that civilian employees of private military contractors are covered

by the provision of the FTCA, which creates an exception to the statute's waiver of sovereign immunity for "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard during time of war." 28 U.S.C. § 2680(j). That conclusion was inconsistent with the law of war—also referred to as the law of armed conflict or international humanitarian law—which regulates the methods of waging war and sets forth protections due to persons caught in such conflicts. *See* U.S. Dep't of the Army, *Field Manual 27-10: The Law of Land Warfare*, ¶¶ 2-3 (July 18, 1956) ("Land Warfare Manual").

This body of international law is founded primarily upon the four Geneva Conventions[2] and upon the customary international law derived over time from the common practices of nations. *Id.* at ¶¶ 4, 6. In the wake of World War II, the United States played a leading role in the codification of rules governing humanitarian conduct in wartime, in large part to "enable [the United States] to invoke

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[2] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 ("GC I"); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 ("GC II"); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GC III"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("GC IV").

them for the protection of our nationals" in future conflicts.[3]

Since the Founding of the Republic, treaties and customary international law have been recognized as "part of" U.S. law. *The Paquette Habana*, 175 U.S. 677, 700 (1900); U.S. Const., art. VI, cl. 2. This Court has therefore repeatedly ruled that U.S. law should be construed in a manner consistent with the law of nations. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any possible construction remains."). In particular, the Court has instructed that the law of war is to be considered when defining legal obligations due to "combatants" held in U.S. custody, *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942); *Hamdi v. Rumsfeld*, 542 U.S. 507, 520-21 (2004) (plurality opinion), and has looked to the law of war to inform the meaning of disputed statutory terms related to armed conflict, such as those included in the Authorization for the Use of Military Force, *Hamdi*, 542 U.S. at 520-22, and the Uniform Code of Military Justice, *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006). Accordingly, the "combatant activities" provision of the FTCA, which expressly relates to conduct in a theater of armed conflict, should be interpreted in a manner consistent with the law of war.

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[3] *Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Comm. on Foreign Relations*, 84th Cong., 1st Sess. 3-4 (1955) (Statement of Secretary of State Dulles).

Under the law of war, civilian contractors cannot be considered combatants, nor can they lawfully engage in "combatant activities." The Commentary to the Fourth Geneva Convention explains that "[e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, [or] a civilian covered by the Fourth Convention." ICRC, *The Geneva Conventions of 12 August 1949: Commentary to the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 51 (Jean S. Pictet ed., 1958) ("Commentary to GC IV").[4] In a theater of armed conflict, a civilian contractor cannot be transformed into a soldier even when he is "integrated into the military's operational activities" or "performing a common mission . . . under ultimate military command." *Compare Saleh*, 580 F.3d at 6-7. Under the law of war, "*[t]here is no* intermediate status." *Commentary to GC IV* (emphasis in original).

The Third Geneva Convention sets out the humanitarian protections due to privileged combatants, or what are commonly known as prisoners of war ("POWs"). Under Article 4 of the Third Convention, POW status is authorized for "[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces." GC III, art. 4(A)(1). Persons who are not members of a

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[4] The armed conflict in Iraq, the theater of war in which the alleged torture and abuses at issue arose, is governed by the Geneva Conventions. *See* GC I, art. 2; GC II, art. 2; GC III, art. 2; GC IV, art. 2.

state's armed forces—*i.e.*, "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements," GC III, art. 4(A)(2)—may still be regarded as combatants entitled to POW status if they possess four key attributes of membership in a state's regular armed forces.[5]

Civilian contractors appear to fall under GC III, Article 4(A)(4), which covers logistical support personnel accompanying armed forces. However, while all individuals described in GC III Article 4(A)(1)-(6) receive POW status, only those in GC III Article 4(A)(1)-(3) and (6) are considered combatants. *See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, June 8, 1977, 1125 U.N.T.S. 3, art. 50(1) ("AP I"). Those described in Articles 4(A)(4) and (5)—that is, contractors accompanying the military—thus remain civilians under the Geneva Conventions. *Id.*; ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, art. 43, at ¶ 1677 (Yves Sandoz, et al. eds., 1989) ("[O]nly members of the armed forces are combatants. This should therefore dispense with the concept of 'quasi-combatants'. . . ."). Accordingly, under governing "longstanding law-of-war principles," *see Hamdi*, 542 U.S. at 521, the term "*combatant activities* of the military or naval forces,

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[5] GC III, art. 4(A)(2) provides that a member of a militia may be a combatant when he is "commanded by a person responsible for his subordinates," wears "a fixed distinctive sign recognizable at a distance," carries "arms openly" and conducts "operations in accordance with the laws and customs of war."

or the Coast Guard during time of war," 28 U.S.C. § 2680(j) (emphasis added), cannot be interpreted to cover civilian contractors such as the Respondents in this case.

The law of war not only sets out the precise—and binding—obligations of parties to an armed conflict, equally important, these rules also seek to further broader humanitarian principles and thus protect all persons, including U.S. soldiers, in a theater of war. Specifically, by privileging (*i.e.*, authorizing) certain kinds of behavior when armed conflict occurs, the law of war creates incentives for such conflicts to be conducted humanely. The law of war recognizes that if conflict must happen, it should be undertaken only by soldiers of a regular state army or other specified militia members who themselves abide by the law of war and are subject to a responsible chain of command. *See* GC III, arts. 4(A)(1)-(3). Combatants (as defined by GC III) are permitted to engage in hostilities against other combatants and to utilize lethal force without fear of criminal prosecution for their acts, provided that they observe the law of war. *See* GC III arts. 87, 99; AP I, art. 43(2). Further, lawful combatants who are captured are denominated POWs and are entitled to a host of additional legal and humanitarian protections not available to noncombatants (civilians) who engage in unprivileged belligerency. *See, e.g.*, GC III, Parts II-V.

At the same time, civilian status is also privileged and protected, albeit in different ways. Civilians who do not participate in hostilities cannot be targeted with force. *See* GC I, art. 3(1); GC II, art. 3(1); GC III, art. 3(1). But a civilian who acts as a

combatant and engages in direct hostilities loses his immunity from attack. *See id.* Because engaging in hostilities by persons not subject to a responsible command is disfavored, these civilians are treated as unprivileged belligerents and are thus denied POW protections and the immunity from prosecution provided to lawful combatants.[6]

Maintaining a strict distinction between combatants and civilians thus promotes the "principle of distinction"—referred to as "the grandfather of all principles" upon which humanitarian law is founded—which provides "that military attacks should be directed at combatants and military property, and not civilians or civilian property." U.S. Army Judge Advocate General's Legal Ctr. & Sch., *Law of War Handbook* 166 (2005) ("JAG Law of War Handbook"). Under this law-of-war principle, combatants should know that they can be punished for attacking civilians and civilians should know that they lose protection from attack if they participate in hostilities; with those lines drawn, hostilities should be limited to only genuine combatants—*i.e.*, members of the regular armed forces of a state—and not civilians, such as Respondents in this case.

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[6] HCJ 769/02 Pub. Comm. Against Torture in Israel v. Israel [2005] ¶¶ 31-40; Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 Int'l Rev. Red Cross 45, 46-47 (2003).

B. In the U.S. Military's Expert Judgment, Civilian Contractors Should Not Be Treated as Combatants.

In accordance with the law of war, U.S. military regulations also establish a clear and meaningful distinction between combatants on the one hand and civilians on the other—a distinction that does not support the court of appeals' conclusion that the two are functionally equivalent. Army regulations implementing law-of-war principles expressly recognize that "[c]ontractors and their employees are not combatants, but civilians" and specifically prohibit contractors from engaging in any activity that would "jeopardize" their status as civilians. U.S. Dep't of the Army, *Field Manual 3-100.21 (100-21): Contractors on the Battlefield*, ¶ 1-21 (Jan. 2003) ("Field Manual on Contractors").

For example, the Department of Defense has recognized that contingency contractors are "civilians accompanying the force" who are barred from "inherently governmental" functions and duties. U.S. Dep't of Defense, *Instruction 3020.41: Contractor Personnel Authorized to Accompany the U.S. Armed Forces*, ¶¶ 6.1.1, 6.1.5 (Oct. 3, 2005). The Department of Defense has also expressly stated that in relying upon contractors, "the Government is not contracting out combat functions." Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized to Accompany U.S. Armed Forces, 73 Fed. Reg. 16,764-65 (Mar. 31, 2008) (to be codified at 48 C.F.R. pt. 212, 225, and 252).[7]

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[7] Respondents had a similar understanding. *See Saleh*, 580 F.3d at 33 n.28 (Garland, J., dissenting) (quoting CACI

Moreover, the military recognizes that by limiting combat to organized armies, the law of war promotes a vital system of command responsibility. *See, e.g.*, AP I, art. 43; *Land Warfare Manual*, ¶ 501. Specifically, the military chain of command exposes combatants to the sanctions of both international law and domestic military discipline, and ensures that military superiors are also held responsible by virtue of their command responsibility. *Id.* These enforceable disciplinary procedures, as well as training in the law of armed conflict, make it less likely that violations of the law of war will occur—as they did at Abu Ghraib—than if non-accountable persons engage in combatant activities. Military leaders like *amici* recognize that maintaining systems of accountability and clear command responsibility is thus critical to the U.S. military's lawful participation in any armed conflict. Likewise, military leaders like *amici* firmly believe that fidelity to law-of-war principles furthers the United States' commitment to humane treatment, and ultimately preserves the hard-earned reputation and strength of this country's armed forces.

In creating a novel judicial extension of the "combatant activities" provision of the FTCA to cover civilian contractors, the court of appeals ignored meaningful distinctions between combatants and civilians embodied in humanitarian law principles, as well as the experienced judgment of the U.S. military. Given the importance of these principles to

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Statement of Work, which states that CACI's employees "are considered non-combatants").

the strength of the armed services, *amici* urge this Court to review the lower court's decision.

II. THE COURT OF APPEALS' RULING GRANTING CIVILIAN CONTRACTORS CATEGORICAL CIVIL LAW IMMUNITY FOR "COMBATANT ACTIVITIES" FAILS TO APPRECIATE THE SIGNIFICANCE OF THE MILITARY CHAIN OF COMMAND AND CREATES A DANGEROUS GAP IN ACCOUNTABILITY FOR UNLAWFUL ACTIVITY, INCLUDING TORTURE.

Membership in the U.S. Armed Forces carries with it significant privileges but also heavy obligations, foremost among them being respect for the law of war and for the military chain of command. These cornerstones of the modern American Armed Forces reflect a culture and tradition that demands rigorous training, discipline and accountability. But private military contractors, by contrast, are no more than corporate entities, whose activities are governed only by contractual relationships with the military and who are primarily accountable to private shareholders. Because they are not subjected to the same standards of accountability as are members of the military, private contractors do not merit the immunity afforded to sovereign governmental entities, now provided to them by the decision of the court of appeals.

A. Civilian Contractors, Unlike Members of the U.S. Armed Forces, Are Not Subject to a System of Discipline, Training and Accountability, Which Is at the Core of the Military Chain of Command.

All members of the U.S. Armed Forces adhere to a strict chain of command. At the top of the chain is the constitutionally mandated—and long-standing tradition—of civilian control of the military. *See* U.S. Const. art. I, §8 (congressional power to declare war); art. II, §2 (President of United States is "commander in chief" of the Army and Navy). At the lower end of the chain, soldiers are subject to an elaborate system of discipline and training that obligates them to follow the commands of superior officers upon pain of punishment or discharge. *See United States v. Brown*, 348 U.S. 110, 112 (1954) (recognizing the "peculiar and special relationship of the soldier to his superiors").

As this Court has recognized, the military imposes "overriding demands of discipline and duty," *Burns v. Wilson*, 346 U.S. 137, 140 (1953), which become especially "imperative in combat," *Chappell v. Wallace*, 462 U.S. 296, 300 (1983). Over the centuries, a unique "hierarchical structure of discipline and obedience to command . . . wholly different from civilian patterns" has developed, which ensures that combatant activities are performed in accordance with the law of war. *Id.*

Specifically, soldiers who disobey orders, unlike civilian contractors who may accompany soldiers on the field, are routinely subject to discipline and punishment under the Uniform Code

of Military Justice ("UCMJ"), art. 90, 10 U.S.C. § 890. Indeed, eleven of the soldiers involved in the torture of prisoners at Abu Ghraib have been convicted by courts-martial for offenses ranging from dereliction of duty to assault. Ben Nuckols, *Abu Ghraib Probe Didn't Go Far Enough*, ARMY TIMES, Jan. 13, 2008; Eric Schmitt & Kate Zernike, *Abuse Convictions in the Abu Ghraib Prison Abuse Cases, Ordered by Date*, N.Y. Times, Mar. 22, 2006. Between October 2001 and March 2006, 251 officers and enlisted soldiers were punished in some fashion for mistreating prisoners. Eric Schmitt, *Iraq Abuse Trial Is Again Limited to Lower Ranks,* N.Y. Times, Mar. 23, 2006. Likewise, the military has sanctioned officers administratively, by reassignment or even demotion. *Id.* But significantly, the military simply cannot exercise the same authority over Respondents' employees because it lacks the legal authority to do so.

Just as important to the proper functioning of the military chain of command is the duty that commanders owe to subordinates. Command responsibility "is the legal and ethical obligation a commander assumes for the actions, accomplishments, or failures of a unit." U.S. Dep't of the Army, *Field Manual 101-5: Staff Organization and Operations*, 1-1 (May 31, 1997). Because the doctrine of command responsibility mandates that commanders have an affirmative duty to prevent the commission of war crimes, they can be court-martialed in dereliction of duty for failure to do so. *See* 10 U.S.C. § 892.

As Judge Garland explained in his dissenting opinion, private military contractors, such as the

Respondents in this case, are decidedly not part of the military chain of command, nor are they actually subject to "ultimate military command" in any meaningful sense. *Saleh*, 580 F.3d at 22-24, 34. Military commanders can only direct the activities of contractor companies through the terms of a contract. And because employees of contractors owe no duty to a military commander comparable to that of a soldier, contractor employees may contravene or ignore a military officer's orders while suffering only the consequences of potential termination, including any penalties for breach of contract.

Moreover, the Army Field Manual expressly recognizes that "contractor employees are not the same as government employees" and that "only contractors manage, supervise, and give directions to their employees." *Field Manual on Contractors*, ¶ 1-22 (2003). The military thus recognizes that employees of private military contractors are not subject to military discipline and "[c]ommanders have no penal authority to compel contractor personnel to perform their duties." *Id.* at ¶ 4-45; *see also* Joint Chiefs of Staff, *Joint Publication 4-0: Doctrine for Logistic Support of Joint Operations*, V-8 (2000) ("[c]ontract employees are disciplined by the contractor"). Titan's contract with the U.S. Army confirms this understanding.[8]

In contrast, a private military contractor presumptively owes a higher duty of care to its

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[8] *Saleh*, 580 F.3d at 33 n.28 (Garland, J., dissenting) ("[p]ersonnel performing work under this contract shall remain employees of the Contractor and will not be considered employees of the Government") (quoting Titan contract).

shareholders than to a military officer or the U.S. government. The lower court's observation that private military contractors "were subject to military direction, even if not subject to normal military discipline," 580 F.3d at 7, thus reveals a misapprehension of the fundamental legal and moral difference between contractual obligations and command responsibility, and correspondingly, between civilian and combatant status. It is only the military chain of command, enforced through "normal military discipline," *id.*, which ensures that our soldiers obtain the privileges of genuine combatant status under the law of war. *See supra* Point I(A). Being subject to this system of military accountability likewise entitles members of the military to immunity from a system of civilian liability for "combatant activities" during "time of war." 28 U.S.C. § 2680(j). Indeed, insistence upon high standards and accountability is what distinguishes our fighting forces from mercenaries or unlawful combatants and is what gives our soldiers moral license to take human life on this country's behalf.

In view of this unique system of training, responsibility and justice, it makes sense for Congress to have exempted under the FTCA those subject to a military chain of command from state law tort liability. That logic does not similarly or legally extend to the contractors who work for the military or their employees.

B. Exempting Civilian Contractors from Basic Liability Rules Provides Corporate Actors Unwarranted Impunity for Unlawful Activity, Including Torture.

The decision of the court of appeals not only misapprehends the unique obligations of U.S. military service, it also sanctions a troubling—and anomalous—lack of accountability for misconduct on the battlefield undertaken by civilian actors.

A number of U.S. soldiers have been convicted pursuant to the UCMJ for their roles in the abuses at Abu Ghraib and over 250 other military personnel were sanctioned in the years between 2001-2006 for instances of prisoner abuse. Schmitt, *Iraq Abuse Trial*, *supra*. Equally important, the military, as an institution answerable to Congress and committed to its self-imposed traditions of excellence and professionalism, has attempted to address systemic dysfunction within the chain of command that permitted the abuses at Abu Ghraib to occur in the first place.

For example, following revelations of abuse at Abu Ghraib, the military assigned an officer with the rank of Major General, who reported directly to the Commander of Multinational Forces in Iraq, to direct detention and interrogation operations. *See* U.N. Comm. Against Torture, *Second Periodic Reports of the States Parties Due in 1999: United States of America*, at 80, U.N. Doc. CAT/C/48/Add.3 (May 6, 2005). In response to Congressional guidance, the military has also increased training

requirements for intelligence units,[9] commissioned reports by high-level military officials to investigate and document individual and systematic errors made by the military,[10] and applied administrative sanctions to some of those with command responsibility.[11] In short, consistent with its status as a politically and legally accountable government entity, the military has taken meaningful measures to prevent the recurrence of the abuses at Abu Ghraib.

Absent traditional tort liability, there is not a meaningful mechanism to hold accountable those who engage in patently unlawful conduct or to deter

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[9] *See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1092, 118 Stat. 2069 (2004).

[10] *See generally* Major General Antonio M. Taguba, *Army Regulation 15-6 Investigation of the 800th Military Police Brigade* (2004); Major General George R. Fay, *Army Regulation 5-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade* (2004).

[11] *Amici* express no opinion with respect to ongoing debates about the adequacy of the disciplinary response to Abu Ghraib, but note that even the military's critics concede that administrative sanctions carry great weight within the professional officer corps. For example, Lt. Gen. Ricardo Sanchez, who was ultimately responsible for Abu Ghraib, "was never forwarded for assignments which would require a promotion. . . . [T]he military quietly ended his military career [, a sanction] in the ethic of the professional officer corps . . . typically seen as quite severe." Victor Hansen, *Creating and Improving Legal Incentives for Law of War Compliance*, 42 New Eng. L. Rev. 247, 258 (2008); *see also* Laura A. Dickinson, *Torture and Contract*, 37 Case W. Res. J. Int'l L. 267, 274 (2006) ("[W]ithin the military... demotion and firing are sanctions that are very strongly felt.").

private military contractors from abusing prisoners in the future. The criminal sanctions contained in the UCMJ do not apply to the conduct of the contractors in these cases.[12] While the Military Extraterritorial Jurisdiction Act ("MEJA"), 18 U.S.C. § 3261 *et seq.*, provides for the criminal prosecution in certain circumstances of civilians serving abroad, since the beginning of hostilities in Afghanistan and Iraq, it has not been used by U.S. prosecutors to address the grave abuses committed by contractors at Abu Ghraib. *See* Lieutenant General Anthony R. Jones, *Army Regulation 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade*, at 130-134 (2004). While MEJA has been utilized in a handful of successful prosecutions outside the context of the Abu Ghraib scandal, there remain significant jurisdictional and substantive limitations to its use against contractors. *See* Jennifer K. Elsea, Cong. Research Serv., *Private Security Contractors in Iraq and Afghanistan: Legal Issues*, R40991, at 22-24 (Jan. 17, 2010); *see also* Frederick Stein, *Have We Closed the Barn Door Yet? A Look at the Current Loopholes in the Military*

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[12] Congress recently amended the jurisdiction of the UCMJ to apply to civilians "serving with or accompanying an armed force in the field." 10 U.S.C. § 802 (a) (10). Yet in light of this Court's holding in *Reid v. Covert*, which held unconstitutional the application of military justice to civilians for crimes committed on overseas military bases, 354 U.S. 1, 40 (1957), there is a serious constitutional question as to whether the form of military justice embodied in these amendments could ever be applied to civilians presumptively entitled to constitutional protections. The constitutionality of military jurisdiction over civilians is highly uncertain precisely because of the fundamental distinction between soldiers and civilians.

Extraterritorial Jurisdiction Act, 27 Hou. J. Int'l L. 579, 596-97, 603 (2005) (characterizing MEJA as full of legal loopholes). In light of the statute's unusual requirements for triggering an investigation, broad prosecutorial discretion, and other practical obstacles to prosecution, MEJA in operation actually provides limited deterrence value. *See* Steven Paul Cullen, *Out of Reach: Improving the System to Deter and Address Criminal Acts Committed by Contractor Employees Accompanying Armed Forces Abroad*, 38 Pub. Cont. L.J. 509, 534-36 (2009).

At the same time, absent the coercive effect of tort liability, private military contractors have little incentive to prevent future abuses by their employees, through systemic reform or otherwise. Corporations may shift responsibility to individual employees and claim that they have fulfilled their legal obligations by firing them.[13] Even the reputational harm that might be visited upon a corporate entity for widespread misconduct may be largely avoided by a simple name change.[14] Retired

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[13] The comments of Blackwater CEO Erik Prince offer an illustrative example. In response to questions from Rep. Carolyn Maloney regarding an employee who shot and killed an Iraqi in the Green Zone while drunk, Prince answered, "He didn't have a job with us anymore. We, as a private company, cannot detain him. We can fire, we can fine, but we can't do anything else." *Blackwater USA: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 59 (2007) (statement of Erik Prince, Chairman, the Prince Group, LLC and Blackwater USA).

[14] *See Blackwater Changes Its Name to Xe*, N.Y. Times, Feb. 13, 2009, at A10 (Blackwater Worldwide "abandon[ed] the brand name that has been tarnished by its work in Iraq, settling on Xe . . . as the new name for its family of two dozen

Marine Lieutenant Colonel Mike Zacchea reiterated these concerns when he said of contractors, "[T]hese guys are free agents on the battlefield. They're not bound by any law. . . . No one keeps track of them." Deborah Hastings, *Iraq Contractors Accused in Shootings*, Wash. Post, Aug. 11, 2007. Retired Army Colonel Teddy Spain also complained, "My main concern was their lack of accountability when things went wrong." Sudrasan Ragahavan & Thomas E. Ricks, *Private Security Put Diplomats, Military at Odds: Contractors in Iraq Fuel Debate*, Wash. Post, Sept. 26, 2007, at A01. Neither the employees' contractual duty to the corporation, nor the directors' obligations to shareholders, are an adequate substitute for military training and accountability.

It is for this reason that the Defense Department explicitly warned contractors that they would be subject to traditional liability rules for their misconduct and could not assume the Government's sovereign immunity to defeat litigation in U.S. Courts. Specifically, the Department advised military contractors that "[i]nappropriate use of force could subject a contractor or its subcontractors or employees to prosecution or *civil liability* under the laws of the United States and the host nation." Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized to Accompany U.S. Armed

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businesses"); Andrew Ross Sorkin, *L-3 to Acquire Titan, Expanding Share of Military Market*, N.Y. Times, Jun. 5, 2005, at C2, (reporting that L3 Communications acquired Respondent Titan Corporation, which now operates under the "L3" moniker).

Forces (DFARS Case 2005–D013), 73 Fed. Reg. 16,764, 16,767 (Mar. 31, 2008) (emphasis added) (codified at 48 C.F.R. § 252.225-7040(b)(3)(iii)). Recognizing the unfairness that would result if civilian contractors are deemed immune from tort liability, the Defense Department has taken the position that governmental immunity should not result in "courts . . . shift[ing] the risk of loss to innocent third parties" when contractors cause injuries. *Id.* at 16,768.

In the absence of effective forms of military justice, training and discipline, tort liability provides a critical mechanism to ensure that a corporation's employees do not engage in abusive or unlawful treatment of "innocent third parties" to whom they owe a duty of care. *See* W. Paige Keeton, et al., *Prosser and Keeton on Torts* § 4, at 25 (5th ed. 1984) (stating that in the field of torts, "[t]he 'prophylactic' factor of preventing future harm" has been an important consideration for courts, which recognize that when "defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm"); Guido Calabresi, *The Cost of Accidents* 26-29, 95-129 (1970) (observing that tort liability forces corporations to internalize costs of employees' unlawful behavior and thus provides economic incentive to observe their duties in the future).

Under the court of appeals' formulation, this mechanism for accountability has been eviscerated. *Certiorari* should be granted to avoid this unacceptable result.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that the petition for a writ of *certiorari* should be granted.

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